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IN THE

Supreme Court of the United States

No. 567

OCTOBER TERM, 1957

MISSISSIPPI RIVER FUEL CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION AND
UNITED GAS PIPE LINE COMPANY,
Respondents.

BRIEF OF UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF FACTS

On July 3, 1952, at G-2019, United[1] filed notice of increased rates to certain pipe line companies, including Petitioner (R. 987-9). The Commission suspended and ordered hearing pursuant to Section 4(e) of the Act (R. 991). The increased rates became effective subject to refund (R. 1006).

The increased rates were for service to Petitioner rendered by filed contract dated August 1, 1929, and amendments (R. 644, et seq), which were converted to tariff form, also filed at G-2019 pursuant to Regulations in Part 154, promulgated by Commission Order 144.

[1] In this *Brief* Petitioner Mississippi River Fuel Corporation will be referred to as *Petitioner*, Respondent Federal Power Commission will be referred to as *Commission*, Respondent United Gas Pipe Line Company will be referred to as *United*. The Natural Gas Act will be referred to as the "Act". (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq.) All emphasis in this brief is added unless otherwise noted.

G-2019 was consolidated with G-1142, an investigation of all of United's rates pursuant to Section 5(a) of the Act instituted by the Commission, suo motu, in 1948 (R. 740).

On the date of filing G-2019, United was engaged in constructing additional facilities certificated by the Commission at G-1447. Contract with Petitioner (December 1, 1951, R. 706) for gas from G-1447 facilities was temporarily approved by the Commission (R. 822) upon express condition it was subject to ultimate disposition in the 5(a) (G-1142) consideration of all G-1447 and pre-G-1447 rates. Therein, the Examiner said, originated the practice of separate billing between the "old" and "new" contracts (R. 899).

G-2019 did not involve the G-1447 facilities or the 1951 contract for service therefrom.

G-1142, as Section 5(a) provided, involved determination of the "just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force", for (a) the G-1447 additional facilities and the 1951 contract for service therefrom, as well as (b) the G-2019 pre-G-1447 facilities and the 1929 contract as amended for service therefrom, and (c) the Conversion Tariff.

During hearings, the Commission Staff developed a cost of service and rate forms based on its investigation in the 5(a) investigation (G-1142). United and all pipe line customers except Petitioner agreed. The Commission issued Opinion and Order 277 (R. 798) approving the agreement but ordered hearing for Petitioner.

In such hearing, Petitioner sought (1) continuance of the separate rates of the 1929 and 1951 contracts; (2) cost of service and rates for each contract upon allocation of the specific facilities claimed to be used for each; (3) continuance of an option provision in the 1929 contract, as

amended (R. 682) claimed to vest Petitioner with right to require United to increase upon notice, United's percentage of the requirements of Petitioner's pipe line system; (4) rejection of the Staff proposal to include a 72% "take-or-pay-for" minimum provision to eliminate asserted preferential treatment which absence of such clause gave Petitioner against all other customers of the same class subject to a "take-or-pay-for" minimum provision.

Upon exhaustive analysis of the record, the Examiner (R. 807-917), affirmed by the Commission (R. 937), made express findings within the requirements of Section 5(a) (R. 912-16) and held:

(a) That United's properties, subject to Commission jurisdiction, were integrated and interconnected (except for Northwest Mississippi, irrelevant here), with a gas supply which formed a common pool for benefit of all customers, so that in accordance with historic Commission principles and policies of allocation, the over-all allocation of United's cost of service by classes of customers was fair, reasonable, and proper; that the two lines from Sterlington to Perryville, delivery point to Petitioner, were tied into all sources of supply into the Monroe District in addition to the line which ran from Carthage to Sterlington, and was thus commingled before delivery to Petitioner; that it was neither feasible, proper, nor in the public interest to undertake, as Petitioner demanded, an allocation of specific facilities and specific sources of supply claimed to be applicable to Petitioner; that continuance of two rates for two deliveries of the same gas at the same point was against the public interest and would result in unreasonable differences in rates and charges for the same service at the same delivery point in violation of Section 4(b) of the Act;

(b) That continuance of the "option" would be against the public interest, because affording Petitioner a pref-

ertial right which also would constitute discrimination against other customers in the same class; that such "option" was in violation of Section 7(c) of the Act;

(c) That the inclusion of the "take-or-pay-for" minimum clause was just and reasonable.

Despite the Examiner's declaration that "full" hearing for Petitioner was under Sections 4 and 5 of the Act (R. 814), the Commission directed insertion in Finding 2 (R. 913) to add formal reference to Section 5 of the Act (R. 939) as definitive of the decision's scope.

On the foregoing holdings, the facts stated by the Court below (Petition, App. A, 2, 6-13) are accurate and faithful to the record.

COUNTER-QUESTION PRESENTED

Whether the Federal Power Commission is authorized by its review powers under Sections 4(e) and 5(a) of the Natural Gas Act to direct a natural gas company to make filings to effectuate the "just and reasonable rate, charge, * * * practice, or contract to be thereafter observed and in force" fixed by order as required by Section 5(a), when, in a hearing on the merits of an investigation under Section 5(a), the Commission has found that two contracts with the same purchaser providing for different rates for the same service at the same delivery point were unjust and unreasonable, productive of undue preference to the purchaser and undue discrimination against other customers.

ARGUMENT

(a) The Ordered Form of Rolled-in Rates for Sales.

The whole thrust of Petitioner's position was retention of two rates. All else was designed to support that end.

It asserted that performance under the "old" (1929) contract gave it a vested right in the reserves supplying that contract, and in the depreciation in the line or lines permitted by Commission Accounting Rules (R. 773-4). This it claimed showed right to retention of two rates and to an allocation segregating and separating the lines into the Perryville delivery point from the remainder of United's system so that it would be chargeable with a cost of service allocable to each line.

The "old" contract does not support Petitioner's claim to dedicated sources of supply. The original contract specified deliveries from the Monroe and Richland gas fields in Louisiana, but provided United should not be obligated to acquire additional lands, leases or gas to ensure such deliveries (R. 658). Depletion in Monroe and Richland becoming serious, the contract was amended to permit deliveries from Rodessa, Sugar Creek and Cotton Valley fields, though providing that gas from those fields should not become part of the regular supply to be delivered by the contract as amended (R. 669). Finally, without dedication or mention of any source of supply, it was agreed that gas to be delivered would be transported through a pipe line running from the Carthage field in Texas to a point in the Monroe field in Louisiana (R. 675).

The Examiner found this gas was commingled system gas, incapable of identification as to source (R. 891-2; 899-900; Finding 13, R. 914).

In *Board of Public Utility Commissioners* v. *New York Telephone Company* (1926), 271 U.S. 23, this Court declared:

> "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they

do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company."

In Opinion 277, the Commission joined this Court, stating:

"This Commission has never recognized a proprietary right or preferential advantage to anyone by reason of the terms of a contract or otherwise, where it might be claimed that such individual should be entitled to rates reflecting costs limited to specified facilities without regard for over-all costs reflecting system operations. The Commission has made this abundantly clear in its various decisions relating to rates" (R. 778).

Under similar circumstances, the Commission had prohibited continuance of two rates for the same service to Texas Gas Transmission Corporation (R. 779-80), a customer of the same class as Petitioner. It's delivery point is in the same zone, less than a mile from that to Petitioner (R. 779).

Thus the Examiner and the Commission concluded that continuance of two rates upon the historical contract relationship between Petitioner and United "without regard to rights of other customers in the same class, receiving the same service, in the same rate zone, would amount to unlawful discrimination against such customers", would not be in the public interest, and should not be continued (R. 896). This discloses that Petitioner demands the very things prohibited by Section 4(b).[2] Denial and excision were author-

[2] Section 4(b) of the Act provides

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

ized, indeed made obligatory, by the power and duty under Sections 4 and 5. Such conclusions are in good company. Judge Cardozo, in *Postal Telegraph-Cable Company* v. *Associated Press*, (1920), 127 N.E. 256, declared:

> "I think the plaintiff cannot justify discrimination among customers by dividing contracts into new and old, and applying a different rate to each. The law says that under like conditions of service, charges shall be equal * * * " (p. 257).

Compare *ICC* v. *United States* (1933) 289 U.S. 385, 389, which expressed similar views, noting *Postal*.

Petitioner's fixation is explainable from the admission that its nomination for delivery under the "new" (1951) contract was of a "lesser volume" (R. 774). Thus by manipulation of larger volumes specified for deliveries under the "old" contract against smaller deliveries under the "new" contract, Petitioner apparently achieved a selective de facto rolled-in rate for the same commingled gas at the same delivery point, lower than the actual rate paid by others of the same class. Disparity between volumes specified for delivery would give Petitioner continuing power to control determination of the amount of such preferential advantage. Such manipulation also would make it possible for Petitioner to escape paying its fair and proper proportion of the cost of service, thus compelling other customers in the same class to assume and bear an undue proportion thereof. *Mobile's* suggestion that contracts might produce "varying terms" (Pet. 10) may not be utilized, as Petitioner seeks, to legitimize such unlawful rate practices.

The Commission order, as 5(a) prescribed, determined the just and reasonable rate and contract thereafter to be

observed; made impossible perpetuation of preference to Petitioner; and destroyed the resulting unlawful discrimination against other customers.

(b) The Option.

The "old" contract (second paragraph, Article 6, Supplement 11, R. 682) gave Petitioner an option to increase the percentage of its requirements furnished from United's pipe line system.

Order 144, which promulgated Regulations in Part 154 (18 C.F.R.) required United to convert contract rate schedules to tariff form rate schedules.[3] This conversion tariff, filed at G-2019, omitted the option of Article 6 because such was in conflict with the letter and spirit of the Regulations. Section 154.85 permitted retention only of those parts "not superseded by or in conflict with other applicable provisions of the tariff." Retention would have violated Section 154.63(5),[4] for exercise of the so-called option would require a prohibited amendment of the pre-existing contract, rather than the required execution of a new service agreement.

In addition, exercise of the claimed option would give Petitioner automatic power to change and increase required deliveries, though Section 7(c) of the Act prohibits such increase except upon express authorization from the Commission. Necessarily, as the Examiner held, the agreement was "subject to the paramount provisions of the Act" R. 908).

Qua contract, the option was exhausted by Petitioner's 1949 exercise approved by the Commission (Supplement

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[3] The Court below in *United Gas Pipe Line Company* v. *Federal Power Commission*, 86 App. D.C. 314, 181 F. 2d 796, cert. den. 340 U.S. 827, held Regulations promulgated by Order 144 to be valid exercise of authority by the Commission under Sections 4(c) and 16 of the Act.

[4] "(5) *Changes in executed service agreements.* Agreements intended to effect a change or revision of an executed service agreement shall be in the form of a superseding executed service agreement only. Service agreements shall not contain any supplements." (18 C.F.R. 154.63(5)).

15, R. 687). The option (R. 682) gives the Buyer the right "at any time" (not "at any time *from time to time*") to notify seller "on or before May 1 of *any* year", (not "on or before May 1 of *each* or *every* year"), between 1946 and 1951. The language of the option following is in the singular, i.e., should such "notice" be given, the "quantity" which Buyer shall purchase "commencing on November 1 *of the year*, (not "*those years*") in which such "*notice*" (not "*notices*") is given.

It further provided that if capacity in the line from Carthage to Sterlington was insufficient to carry such increased quantity, then United would build and add such increased capacity upon Petitioner's advance of funds "not exceeding $1,500,000" (R. 683). If the option were a continuing one, United's obligation to increase capacity and Petitioner's to advance up to $1,500,000 would, contrary to the language, be equally applicable every year.

The parties were not strangers to language contemplating a continuing right. In Article VII of the three original contracts constituting the base of the "old" contract, it is recited that Petitioner was contracting with others for specified percentages of its requirements after which it provided:

> "In case any of such vendors shall fail, refuse or be unable *at any time and from time to time* to deliver its or their respective cont act percentage or percentages of said requirements of said pipeline, Buyer shall give written notice * * *" etc. (R. 649).

Deliberately, Article VII contained language of continuing right; as deliberately, Supplement 11 did not.

The option provisions must be interpreted against Petitioner, for the rule is well established that contract

options are strictly interpreted in favor of the party bound (United).[5]

The Examiner concluded that if the option meant what Petitioner claimed it would "afford Mississippi a preferential right which would be discriminatory as respects United's other customers", so that elimination was not in violation of law, but in conformity therewith (R. 909).

(c) The Inclusion of the "Take-or-Pay-For" Minimum Clause Was Just and Reasonable.

The "old" (1929) contract had no minimum "take-or-pay" clause; the "new" (1951) contract did. The Commission decided in the 5(a) (G-1142) investigation that the two rates and the two contracts for the same service at the same point should be rolled together (see (a), p. 4-8 infra). Discharging the 5(a) mandate to "determine the just and reasonable * * * contract to be thereafter observed and in force, * * *", the Commission ordered inclusion of a 72% take-or-pay-for clause.

It found that all other pipe line customers in the same rate zone had such take-or-pay-for provisions in the applicable tariff (R. 910). Both the Commission and the Examiner ruled that uniformity on the 72% take-or-pay-for clause maintains and insures equality of treatment, guaranteeing no preference or discrimination. Both held that failure to so require would give Petitioner an undue preference constituting undue discrimination against all others in the same class.

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[5] Williston, Rev. Ed. Sec. 620, thus states the rule: "* * * when contracts are optional with respect to one party, they are strictly interpreted in favor of the party bound and against the party that is not bound." Accord: *McArthur v. Rosenbaum Co. of Pittsburgh* (3 Cir., 1949), 176 F. 2d 617, 620; *Phillips Petroleum Co. v. Curtis* (10 Cir., 1950) 182 F. 2d 122, 125; *Jefferson Hotel Co. v. Jefferson Standard Life Insurance Co.* (D.C.E.D. Mo., 1948), 77 F. Supp. 460, 462; *Rutledge & Taylor Co. v. Mermod, Jaccard & King Jewelry Co.* (Mo. Ct. App., 1922), 237 S.W. 849, 850; *Pyrate Corp. v. Sorensen* (9 Cir. 1930), 44 F. 2d 323, 326, cert. den. 299 U.S. 689.

Before the Examiner (R. 909), and in exceptions to the Commission (R. 932), and in Motion for Rehearing (R. 961): Petitioner contended, as here, that the minimum take-or-pay-for clause was being inserted in the 1945 amendment to the "old" contract. But the Examiner rejected this contention, explaining the requirement applied to service thereafter to be rendered pursuant to the rolled together contracts resulting from the 5(a) investigation (R. 909). He declared inclusion of the minimum take-or-pay-for clause was "lawful, just, and reasonable" (R. 910). The Commission twice agreed (R. 937, 978).

MOBILE NOR SIERRA PACIFIC SUPPORT PETITIONER; INSTEAD THEY DEMONSTRATE CORRECTNESS OF DECISION BELOW.

The findings and holdings of the Commission and the Examiner are within the letter and spirit of Section 5(a) of the Act (see (a), (b), (c), infra). But Petitioner says that the decision of the Court below is wrong because such holdings are not repeatedly *named* 5(a) holdings. This is mere nomenclature. Labelling them 5(a) holdings neither creates nor adds anything to the effectiveness of the decision, or of the Commission's power to so render, or that of the Court below to affirm. Relying upon *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Company* (1956) 350 U.S. 348, Petitioner says that the decision below contravenes "in principle, at least * * *" (Pet. 8) such decisions.[6]

The petition merely reflects the dissent and embraces the same error upon which the dissent is based. The petition

[6] Petitioner also cites *Tyler Gas Service Company* v. *Federal Power Commission* (D.C. Cir.) No. 13623, decided August 1, 1957, yet unpublished. *Tyler Gas*, however, is completely distinguishable from this cause. Additionally, it turns upon a question of res judicata. See Petition for Certiorari pending this term, No. 520.

(p. 9), as the dissent, repeatedly refers to the proceedings before the Examiner and the Commission as a Section 4(e) "proceeding," or a Section 5(a) "proceeding." Thereby it is asserted *Mobile* and *Sierra Pacific* are contravened.

The answers are several: First, there is a 5(a) "proceeding," Docket G-1142 (p. 2, infra), not present in those cases. Next, Petitioner and the dissent forget that *Mobile* teaches there is no separate proceedings under Sections 4 or 5 (350 U.S. 340-1). Indeed *Mobile* declares that the Commission's power and purpose of review is the same under both 5(a) and 4(e) (350 U.S. 341).

Sierra Pacific makes this even clearer. The same Court of Appeals decided *Sierra Pacific* (223 F. 2d 605). Upon subsequent motion of Sierra Pacific, that Court changed the last paragraph of its original opinion (p. 609) which authorized the Commission either to dismiss or hold further proceedings under Section 206(a) [16 U.S.C.A. §824e(a)], to a direction to dismiss without prejudice to "a **new** proceeding under §206(a)" (237 F. 2d 756).

This Court, amplifying the holding above in *Mobile*, said:

> "If the proceedings here satisfied *in substance* the requirements of §206(a) it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate" (350 U.S. 353).

Accordingly this Court, ordering no such dismissal, in the last paragraph remanded to the Commission for further proceedings not inconsistent with the opinion (p. 355). Sierra Pacific then moved to amend and supplement the last sentence of this Court's opinion as done by the court below. It stated that the basis upon which the Court of Appeals ordered the amendment shown in 237 F. 2d 756 was that "all parties" assumed there was a distinction between a "proceeding" under Section 205(e) and 206(a) (see "Motion by Respondent, Sierra Pacific Power Company, To

Amend and Supplement Last Sentence of the Court's Opinion" dated April 13, 1956, p. 3-4). This Court denied the motion (351 U.S. 946.)[7]

It is clear that reliance upon "proceedings" under Sections 4 or 5 is misplaced.

This seems sufficient to dispose of Petitioner's suggestion (Pet. p. 9) that the Commission had a Section 4(b) mind rather than a 5(a) mind at the time of the decision. 4(b) prohibits the making or granting of any undue preference or advantage or the subjection to any undue prejudice or disadvantage and prohibits unreasonable differences in rates, service, etc., as between localities or as between classes of service. Equally Section 5(a) provides that if any rate, or charge, or contract, or service, is unjust, unreasonable, unduly discriminatory or preferential, the just and reasonable rate prospectively to control shall be determined and fixed. Both in quality and scope, the purposes of 4(b) and 5(a) are the same.

The Commission is required to administer the prohibition of Section 4(b) and to remove and correct any unlawfulness found under 5(a). This Court declared the powers of the two sections are the same (350 U.S. 341).

Next, it is said that United's filing pursuant to the Commission order was a "unilateral non concensual change" (Pet. p. 11) contrary to *Mobile* and *Sierra Pacific*. Below this was presented as a violation of the proviso of Section 5(a) declaring the Commission without power to order an increase in rate unless such increase was in accordance with a new schedule filed by the natural-gas company.

The Examiner held the Commission amply empowered, in discharging the 5(a) duty, to order the natural-gas company to do or file whatever was necessary to remove any discrimination, preference, etc., found; and, therefore, directed the filing of a tariff to conform to the rates and

[7] This order noted that the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas would grant the motion.

contract provisions established to be thereafter observed. Two Courts of Appeal agree. *Interstate Power Company* v. *Federal Power Commission* (8 Cir. 1956) 236 F. 2d 372, at 377-8, cert. den. 352 U.S. 967; *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipeline Company* (6 Cir. 1949) 173 F. 2d 784.

Mobile and *Sierra Pacific* were only concerned with the right of a natural-gas company to initiate a change in contract rates *absent consent* of the other contracting party. On the contrary, the Commission order here under review was based upon the merits after a full hearing, of a specific 5(a) investigation, Docket G-1142. This was wanting in *Mobile* and *Sierra Pacific*. The rates and contract provisions were Commission determined rates and contract provisions found as prescribed by Section 5(a), not a filing and initiation by United within the pattern of *Mobile* or *Sierra* Pacific.

Congressional action would have been futile, indeed, if its 5(a) direction that "the Commission **shall** determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and **shall** fix the same by order" should be nullified by the proviso immediately following "that the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; * * *". It hardly seems open to doubt that the direction to fix the rate or contract "by order" included all power necessary to direct the natural-gas company, within the proviso, to take such action as would conform to the rate and contract fixed by such order. Under Petitioner's theory, the Commission could discover and declare the discriminations and preferences prescribed, but would be helpless to correct. The Act cannot be so emasculated.

CONCLUSION

The Commission has made findings within the letter and spirit of Section 5(a); it has ordered the natural-gas company to take such action and make such filings as conformed to such findings and orders, which directions it was amply empowered to give by the terms of Section 5(a) of the Act. It seems clear that *Mobile* and *Sierra Pacific* are not truly apropos of this case, but that the Commission order is wholly consistent with the doctrine of these cases, as well as with what Petitioner terms the "principle" of such cases. The decision of the Court below was correct; whereby, the Petition for Certiorari should be in all things denied, and it is respectfully so prayed.

Respectfully submitted

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